A

LEONG KUM WHAY

v.

QBE INSURANCE (M) SDN BHD & ORS

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
AZMEL MAAMOR J
[CIVIL APPEAL NO: W-04-239-2004]

C

24 NOVEMBER 2005

ARBITRATION: *Arbitrator - Death - Where award cannot be remitted due to death of arbitrator - Whether appellate court can substitute award*

D

ARBITRATION: *Arbitrator - Misconduct*

ARBITRATION: *Award - Appeal - Whether application to set aside arbitrator's award is an appeal - Grounds on which award may be set aside*

E

ARBITRATION: *Award - Grounds for setting aside award - Whether award can be set aside where arbitrator without reasons departs from established principle of awarding interest on a debt*

ARBITRATION: *Award - Interest - Whether arbitrator has power to award interest*

F

CIVIL PROCEDURE: *Interest - Whether awarding of interest in a debt claim is a matter of discretion - When should interest commence*

CONSTITUTION: *Courts - Court of Appeal - Whether O. 92 r. 4 Rules of the High Court 1980 can be invoked by Court of Appeal*

G

INSURANCE: *Contract of insurance - Renewal - Whether original proposal form becomes incorporated into renewed policy - Whether change of material circumstances during renewal must be disclosed*

H

INSURANCE: *Accident insurance - Repudiation - Whether failure to disclose material fact entitles insurer to refuse payment*

INSURANCE: *Duty of disclosure - Duty to act uberrimae fides towards each other - Whether duty of disclosure an implied term of contract of insurance - Whether there exists a corresponding duty on insurer to act with utmost good faith towards insured*

I

INSURANCE: *Agents - Section 44A of the Insurance Act 1963 - Whether knowledge of agent can be treated as knowledge of insurer*

An arbitration award was made relating to claims made by the appellant against four different insurance companies on personal accident policies he had taken out with each of them. Of the four claims, three were dismissed by the arbitrator. He allowed the fourth but awarded interest at 8% per annum from the date of the award and not from the date of the accident which was on 26 June 1992.

In relation to the first claim against QBE Insurance ("QBE"), the original policy was issued on 7 March 1991. It was effective until 6 March 1992. During the currency of this personal accident policy, the appellant had obtained two life insurance policies from two other insurance companies. The original policy was renewed on 6 March 1992 for a further period of one year. The renewal was by means of a renewal certificate which, *inter alia*, said that the policy had been renewed for the stipulated period "subject to all terms, conditions and endorsements" in the original policy. The accident in respect of which the appellant made his claim occurred on 26 June 1992. QBE repudiated liability and refused to pay on the grounds that there had been non-disclosure of a material fact by the plaintiff because he had not disclosed the life insurance policies when he had the policy renewed. To justify its repudiation it relied on both the proposal form in respect of the original policy as well as cl. 6.3 of the policy. The proposal form contained the following three important matters. First, a declaration by the plaintiff that all answers and statements made in the proposal were true in every respect. Second, a statement that the proposal and declaration were the basis of the policy and were considered as being incorporated in it ("basis clause"). Thirdly, the appellant answered in negative the question whether he was "at present insured against Life, Accident or Sickness". Now, the appellant's answer that he had no life insurance was accurate at the time when he gave it. But it was no longer true when the policy was renewed with the mutual consent of both parties. The learned arbitrator held that the appellant was under a duty to inform QBE about the life policies because the renewal of the policy had been by mutual consent and hence operated as a fresh contract of insurance. The appellant sought a reversal of the High Court's judgment refusing to set aside the arbitrator's award.

A As for the claim against Malaysia & Nippon Insurans Berhad ("Nippon"), it was not disputed that the original Nippon policy was issued for the period 25 February 1991 to 24 February 1992. On 17 February 1992 a fresh policy was issued for the period 25 February 1992 to 24 February 1993. There was no renewal
B certificate as there was in the QBE case. There was no incorporation clause as was housed in the QBE renewal certificate. There was no fresh proposal form. There was nothing in the second policy to say that it was issued pursuant to the earlier proposal form. The issue was whether this made a difference.

C

In relation to the claim against The Great Eastern Life Assurance Co. Ltd ("Great Eastern"), on 15 March 1992, Great Eastern issued a personal accident policy to the appellant valid for one year. It was based on a proposal form dated 13 March 1992. In
D answer to the question "What Accident, Sickness or Life Insurance do you now carry or applied for?", the appellant had disclosed two life policies and one personal accident policy. In fact, the appellant had two life and seven personal accident policies. The appellant had disclosed all these nine policies to one
E Lee Kow Eee, an agent of Great Eastern who witnessed the proposal form. The learned arbitrator found for Great Eastern on the ground that the disclosure to Lee was not disclosure to Great Eastern. He held that Lee was only a life insurance salesman for Great Eastern and on Lee's own admission had no authority to
F deal with personal accident policies. The learned arbitrator mentioned s. 44A of the Insurance Act 1963 but held that it did not assist the appellant and that the case was governed by the pre-existing common law.

G In respect of the appellant's claim against MUI Continental Insurance Sdn. Bhd where the learned arbitrator found for the appellant but awarded interest on the sum claimed only from the date of the award and not from the date of the accident. He gave no reasons for not making the award. The learned arbitrator had
H since passed away.

I

Held:
Per Gopal Sri Ram JCA:

[1] An application to set aside an arbitrator's award is not an appeal. The grounds on which an award may be set aside are limited to there being an error of law on the face of the record or some misconduct on the part of the arbitrator. "Misconduct" in this context has no pejorative connotation. It is one of the grounds on which an award may be set aside. (p 14 G - H)

[2] The award of the learned arbitrator accurately stated the law on the point about the duty to inform QBE about the life policies. When, as here a policy of insurance for a fixed period is renewed by mutual consent, the original proposal form becomes incorporated into the renewed policy and continues to form the basis of the contract. And more so in the present case where the renewal certificate expressly states that the renewal is "subject to all terms, conditions and endorsements in your original policy". The life policies were a "material fact" in this case. When the renewal certificate said "subject to all terms, conditions and endorsements in your original policy", it includes the declarations in the original proposal form which formed the basis of the contract. They too became part of the renewed policy. Hence QBE was clearly within its contractual rights to refuse payment. The award that dismissed the appellant's claim against QBE was therefore correct. (pp 16 E, 17 G & 18 A - B & F)

[3] It is settled beyond dispute that a contract of insurance is one that imposes a mutual duty on the parties to it to act *uberrimae fides* towards each other. On the part of the insured, he or she must make full disclosure of all material facts. It is not for him or her to decide in his or her own mind what is material. It does not matter whether the insurer asks any questions of the insured. The duty is on the insured to make full disclosure of material facts within his knowledge. Whether a particular fact is material is a question of fact. But the duty to make full disclosure of all material facts is not an implied term of a contract of insurance. There is in fact no contract at the point at which the duty arises; the parties being still at the stage of negotiations. It is therefore a pre-contractual duty

A imposed by the common law. There is a corresponding duty on the part of an insurer to act with utmost good faith towards its insured. (pp 19 A - C & 20 G)

[4] There is no doubt that Nippon's original policy and its second B policy are two different contracts. The appellant was duty bound to disclose the other personal accident policies to Nippon before it issued the second policy. Nippon considered the existence of other personal accident policies to be of significant importance to it. That is why it had put the C question about it in its original proposal form. The appellant had answered that question in the negative. His answer was true at the time he gave it. But it was no longer true when the second policy was issued. The appellant must, as a reasonable man, be taken to have known the importance that D Nippon attached to the existence of other personal accident policies. The arbitrator was therefore entirely correct as a matter law in rejecting the appellant's claim against Nippon. (p 21 D, F - I)

E **[5]** Section 44A of the Insurance Act 1963 requires, first, that there be an agent who is authorised by an insurer and second, that such an agent must solicit or negotiate a contract of insurance in his capacity as agent. Once these two conditions are satisfied certain consequences follow. First, the agent is F deemed to be the agent of the insurer for the purpose of the formation of the contract. Second, the knowledge of the agent about any fact that is relevant to the insurer accepting the risk is treated as the knowledge of the insurer. Where an insurer holds out that a person is its agent, then the G knowledge of the agent is deemed to be the knowledge of the insurer. The only two circumstances in which sub-section (1) does not bite are spelled out in subsection (3). These are collusion or connivance between the agent and the insured; and cessation of agency of which the insurer has taken reasonable steps to inform the public at large. (p 24 D - F)
H

[6] Section 44A targeted the reversal of the common law. The section is remedial. Hence it must be "given a benevolent interpretation". Unfortunately, the learned arbitrator placed a very narrow and restrictive interpretation on s. 44A. The I award in respect of the appellant's claim against Great Eastern was fatally flawed by an error of law and was set aside. (pp 24 G - H & 25 E, H)

[7] The awarding of interest is not a matter of discretion. It is well settled that an arbitrator, in the absence of a specific clause in the agreement, has power to award interest. The general rule in a claim for a debt (and this was a debt owed by the insurer to the appellant) is that interest must run from the date on which the debt became due and payable. In this case it should have been from the date of the accident because that is when the debt accrued. Also, the learned arbitrator was obliged to give his reasons for refusing to award interest in the usual way. His award was therefore liable to be set aside for misconduct in the sense that there has been some "irregularity of action which is not consonant with the general principles of equity and good conscience" because the learned arbitrator, without reasons, departed from the established principle of awarding interest on a debt. (p 26 B - D & F - H)

[8] However, as the learned arbitrator had since passed away, the MUI award could not be remitted to the arbitrator with the appropriate direction to him. Nevertheless, s. 69(4) of the Courts of Judicature Act 1964 and O. 92 r. 4 of the Rules of the High Court 1980 enables the Court of Appeal to do complete justice between the parties. The Court of Appeal has ample jurisdiction and powers to deal with the difficulty that arose in the present instance. There is nothing in the Arbitration Act 1952 that prohibits the Court of Appeal from making an award of interest in a case as the present. The learned arbitrator's award in respect of the fourth respondent was ordered to bear interest at the rate of 8 % from the date of the accident. (pp 27 A, C - D & 28 D, F)

[9] Order 92 r. 4 of the Rules of the High Court 1980 is available to the Court of Appeal because of r. 4 of the Rules of the Court of Appeal. It is jurisdictional in nature. (p 27 F)

[Orders of High Court in respect of first and second respondents confirmed; award in respect of third respondent set aside; award in respect of fourth respondent to bear interest at rate of 8% from date of accident.]

A ***[Bahasa Malaysia*** *Translation Of Headnotes*

Satu award timbangtara telah dibuat berkenaan dengan tuntutan-tuntutan yang dibuat oleh perayu terhadap empat syarikat insuran yang berlainan di atas polisi-polisi kemalangan peribadi yang telah
B dibeli olehnya daripada setiap syarikat tersebut. Daripada empat tuntutan tersebut, tiga telah ditolak oleh penimbangtara. Beliau telah membenarkan tuntutan keempat tetapi telah mengawardkan faedah pada kadar 8% setahun dari tarikh award dan bukan dari tarikh kemalangan yang mana telah berlaku pada 26 Jun 1992.

C Berkenaan dengan tuntutan pertama, terhadap QBE Insurans ("QBE"), polisi asal telah dikeluarkan pada 7 Mac 1991. Ia telah berkuatkuasa sehingga 6 Mac 1992. pada masa polisi kemalangan peribadi itu berkuatkusa, perayu telah membeli dua polisi insurans
D nyawa daripada dua lagi syarikat insurans lain. Polisi asal telah diperbaharui pada 6 Mac 1992 untuk satu lagi tempoh setahun. Pembaharuan itu telah dilakukan melalui satu sijil pembaharuan yang mana, *inter alia*, menyatakan bahawa polisi tersebut telah diperbaharui untuk tempoh yang dinyatakan "subject to all terms,
E conditions and endorsements" dalam polisi asal. Kemalangan untuk yang mana perayu telah membuat tuntutannya telah berlaku pada 26 Jun 1992. QBE telah menolak liabiliti dan telah enggan membayar atas alasan terdapat ketidakpendedahan satu fakta material oleh plaintif yakni ia telah tidak mendedahkan tentang
F polisi-polisi insurans nyawa tersebut semasa ia memperbaharui polisi tersebut. Untuk menjustifikasikan penolakannya, QBE telah bergantung kepada borang cadangan dan kl. 6.3 dalam polisi tersebut. Borang cadangan tersebut telah mengandungi tiga perkara penting seperti berikut. Pertama, satu deklarasi oleh plaintif bahawa
G semua jawapan dan pernyataan yang dibuat di dalam cadangan tersebut adalah benar dalam segala aspek. Kedua, satu pernyataan bahawa cadangan dan deklarasi tersebut adalah asas kepada polisi tersebut dan telah diambil sebagai digabung di dalamnya. ("klausa asas"). Ketiga, perayu telah menjawab dalam negatif soalan sama
H ada dia "at present insured against Life, Accident or Sickness". Jawapan perayu bahawa dia tidak mempunyai polisi insurans nyawa betul pada masa dia memberikan jawapan itu. Tetapi ia tidak lagi betul pada masa polisi tersebut diperbaharui dengan persetujuan kedua-dua pihak. Penimbangtara yang bijaksana telah memutuskan
I bahawa perayu telah berada di bawah satu kewajipan untuk memberitahu QBE mengenai polisi-polisi nyawa tersebut kerana pembaharuan polisi tersebut telah dibuat melalui persetujuan kedua-dua pihak dan oleh itu telah merupakan satu kontrak

insurans yang baru. Perayu telah merayu terhadap keputusan Mahkamah Tinggi yang telah menolak permohonan perayu untuk mengenepikan award penimbangtara.

Berkenaan dengan tuntutan terhadap Malaysia & Nippon Insurans Berhad ("Nippon"), adalah tidak dipertikaikan bahawa polisi asal Nippon telah dikeluarkan untuk tempoh 25 Februari 1991 hingga 24 Februari 1992. Pada 17 Februari 1992 satu polisi baru telah dikeluarkan untuk tempoh 25 Februari 1992 hingga 24 Februari 1993. Tidak terdapat sijil pembaharuan seperti yang terdapat di dalam kes QBE. Tidak terdapat klausa pengabungan seperti yang terdapat di dalam sijil pembaharuan QBE. Tidak terdapat borang cadangan baru. Tidak terdapat apa-apa polisi kedua untuk mengatakan bahawa ia telah dikeluarkan lanjutan kepada borang cadangan pertama. Isunya adalah sama ada perbezaan ini penting.

Berkenaan dengan tuntutan terhadap The Great Eastern Life Assurance Co. Ltd ("Great Eastern"), pada 15 Mac 1992, Great Eastern telah mengeluarkan satu polisi kemalangan peribadi kepada perayu yang sah bagi tempoh satu tahun. Ia adalah berasaskan satu borang cadangan bertarikh 13 Mac 1992. Sebagai jawapan kepada soalan "What Accident, Sickness or Life Insurance do you now carry or applied for?", perayu telah mendedahkan dua polisi insurans nyawa dan satu polisi kemalangan peribadi. Sebenarnya, perayu telah mempunyai dua polisi insurans nyawa dan tujuh polisi kemalangan peribadi. Perayu telah mendedahkan kesemua sembilan polisi ini kepada seorang bernama Lee Kow Eee, seorang ejen bagi Great Eastern yang telah menyaksikan borang cadangan tersebut. Penimbangtara yang bijaksana telah menemui bagi pihak Great Eastern atas alasan pendedahan kepada Lee bukanlah pendedahan kepada Great Eastern. Beliau telah memutuskan bahawa Lee hanyalah seorang jurujual insurans nyawa untuk Great Eastern dan atas pengakuan Lee sendiri dia tidak mempunyai kuasa untuk berurusan dengan polisi kemalangan peribadi. Penimbangtara yang bijaksana telah merujuk kepada s. 44A Akta Insurans 1963 tetapi telah memutuskan bahawa ia tidak membantu perayu dan bahawa kes ini dikawalselia oleh common law yang sedia ada.

Berkenaan dengan tuntutan perayu terhadap MUI Continental Insurance Sdn. Bhd, penimbangtara yang bijaksana telah menemui untuk perayu tetapi telah mengaward faedah atas jumlah yang dituntut hanya dari tarikh award dan bukan dari tarikh kemalangan. Beliau tidak memberikan sebab untuk tidak membuat award tersebut. Penimbantara yang bijaksana telah kini meninggal dunia.

A **Diputuskan**
Oleh Gopal Sri Ram HMR:

[1] Satu permohonan untuk mengenepikan award penimbangtara bukanlah satu rayuan. Alasan-alasan di atas mana satu award
B boleh diketepikan adalah terhad kepada kekhilafan undang-undang pada rekod atau salah laku pada pihak penimbangtara. "Salah laku" dalam konteks ini tidak mempunyai makna yang memperkecil-kecilkan. Ianya adalah salah satu daripada alasan di atas mana satu award boleh diketepikan.

C **[2]** Award penimbangtara yang bijaksana secara betul telah menyatakan undang-undang yang berkenaan mengenai kewajipan memberitahu QBE tentang polisi-polisi nyawa tersebut. Bila, seperti di sini sesuatu polisi insuran untuk satu
D tempoh tetap diperbaharui dengan persetujuan kedua-dua pihak, borang cadangan asal akan menjadi tergabung ke dalam polisi yang diperbaharui itu dan akan terus menjadi asas kepada kontrak tersebut. Lebih-lebih di dalam kes ini di mana sijil pembaharuan telah dengan nyata memperuntukkan bahawa
E pembaharuan itu adalah "subject to all terms, conditions and endorsements in your original policy". Polisi-polisi nyawa tersebut adalah "fakta material" di dalam kes ini. Apabila sijil pembaharuan menyatakan "subject to all terms, conditions and endorsements in your original policy", ia merangkumi deklarasi-
F deklarasi di dalam borang cadangan asal yang merupakan dasar kontrak tersebut. Mereka juga menjadi sebahagian daripada polisi yang diperbaharui itu. Oleh yang demikian QBE adalah dengan jelas di dalam linkungan hak kontraknya dalam enggan membayar. Award yang telah menolak tuntutan perayu
G terhadap QBE adalah dengan itu betul.

[3] Adalah jelas dan tidak boleh dipertikaikan bahawa satu kontrak insurans meletakkan satu kewajipan dua pihak ke atas pihak-pihak untuk bertindak secara *uberrimae fides* terhadap satu sama lain. Pada bahagian sidiinsuran, dia mesti membuat
H pendedahan penuh mengenai semua fakta material. Dia tidak berhak membuat keputusan sendiri mengenai apa yang material. Adalah tidak kira sama ada penginsuran menanya apa-apa soalan kepada sidiinsuran. Kewajipan adalah pada sidiinsuran untuk membuat pendedahan penuh tentang fakta-fakta material
I di dalam pengetahuannya. Sama ada satu fakta itu material adalah satu soalan fakta. Walau bagaimanapun, kewajipan untuk membuat pendedahan penuh untuk semua fakta material

bukanlah satu terma tersirat dalam kontrak insuran. Sebenarnya tidak ada kontrak pada masa kewajipan itu berbangkit, oleh kerana pihak-pihak masih di peringkat perundingan. Ianya dengan itu adalah satu kewajipan pra-kontrak yang diwujudkan oleh common law. Terdapat satu kewajipan yang sama pada pihak penginsuran untuk bertindak secara suci hati terhadap sidiinsuran.

[4] Tidak diragui bahawa polisi asal Nippon dan polisi keduanya adalah dua kontrak yang berlainan. Perayu telah mempunyai kewajipan untuk mendedahkan polisi-polisi kemalangan peribadi yang lain kepada Nippon sebelum ia mengeluarkan polisi kedua itu. Nippon telah menganggap kewujudan polisi-polisi kemalangan peribadi yang lain itu sebagai penting kepadanya. Oleh kerana itu, ia telah meletakkan soalan mengenainya dalam borang cadangan asalnya. Perayu telah menjawab soalan tersebut secara negatif. Jawapannya adalah benar pada waktu ia memberikannya. Tetapi, ianya tidak lagi benar pada waktu polisi kedua itu dikeluarkan. Perayu mesti, sebagai seorang yang waras, dianggap sebagai telah mengetahui tentang kepentingan yang telah diletakkan oleh Nippon kepada kewujudan polisi-polisi kemalangan peribadi yang lain. Penimbangtara dengan itu telah betul dari segi undang-undang dalam menolak tuntutan perayu terhadap Nippon.

[5] Seksyen 44A Akta Insurans 1963 memerlukan, pertama, adanya seroang ejen yang diberikuasa oleh penginsuran. Kedua, ejen tersebut mesti mempelawa atau merundingkan satu kontrak insuran dalam kapasitinya sebagai ejen. Apabila kedua-dua syarat ini ditepati beberapa kesan akan timbul. Pertama, ejen tersebut akan dianggap sebagai ejen penginsuran untuk tujuan mewujudkan kontrak. Kedua, pengetahuan ejen tersebut mengenai apa-apa fakta yang relevan kepada penginsuran menerima risiko itu akan dianggap sebagai pengetahuan penginsuran. Di mana seorang penginsuran memberi gambaran bahawa seseorang itu adalah ejennya, pengetahuan ejen tersebut akan dianggap sebagai pengetahuan penginsuran. Hanya dua keadaan di mana sub-seksyen (1) tidak terpakai adalah dinyatakan di dalam sub-seksyen (3). Ini adalah di mana adanya pakatan atau kerjasama secara diam-diam di antara ejen dan sidiinsuran; dan penamatan ejensi yang mana penginsuran telah mengambil langkah-langkah yang munasabah untuk memberitahu orang awam.

[6] Seksyen 44A adalah bertujuan untuk menterbalikkan common law. Seksyen tersebut adalah bersifat remedi. Jadi ia perlu "diberikan pentafsiran yang meluas". Malangnya, penimbangtara yang bijaksana telah meletakkan satu pentafsiran yang sempit dan terhad ke atas s. 44A. Award yang berkenaan dengan tuntutan perayu terhadap Great Eastern cacat secara memudaratkan akibat kekhilafan undang-undang dan telah diketepikan.

[7] Pengawardan faedah bukanlah satu perkara yang bergantung kepada budibicara. Adalah jelas tertetap bahawa seseorang penimbangtara, dalam ketiadaan satu klausa yang spesifik dalam perjanjian, mempunyai kuasa untuk mengaward faedah. Rukun am dalam satu tuntutan untuk hutang (dan ini adalah satu hutang yang terhutang oleh penginsuran kepada perayu) adalah bahawa faedah mesti bermula dari tarikh bila hutang tersebut telah menjadi terakru dan perlu dibayar. Dalam kes ini, ianya sepatutnya dari tarikh kemalangan kerana itulah masanya bila hutang itu terakru. Juga, penimbangtara yang bijaksana mempunyai kewajipan untuk memberikan alasannya dalam enggan mengaward faedah dalam cara yang biasa. Awardnya dengan itu menjadi boleh diketepikan atas salah laku, iaitu terdapat "ketidakpatuhan tindakan yang tidak konsonan dengan prinsip-prinsip am ekuiti dan niat baik" kerana penimbangtara yang bijaksana, tanpa sebab telah keluar daripada prinsip-prinsip tetap berkenaan dengan pengawardan faedah ke atas hutang.

[8] Walau bagaimanapun, kerana penimbangtara yang bijaksana telah kini meninggal dunia, award MUI tersebut tidak boleh diremit kepada penimbangtara dengan arahan-arahan yang berkaitan. Namun, s. 69(4) Akta Mahkamah Kehakiman 1964 dan A. 92 k. 4 Kaedah-Kaedah Mahkamah Tinggi 1980 membolehkan Mahkamah Rayuan melakukan keadilan di antara pihak-pihak. Mahkamah Rayuan mempunyai bidangkuasa dan kuasa-kuasa yang luas untuk menguruskan masalah yang timbul dalam kes ini. Tiada apa-apa dalam Akta Timbangtara 1952 yang menghalang Mahkamah Rayuan daripada membuat award untuk faedah dalam satu kes seperti di sini. Award penimbangtara yang bijaksana berkenaan dengan responden keempat diperintahkan supaya membawa faedah pada kadar 8% dari tarikh kemalangan.

[9] Aturan 92 k. 4 Kaedah-Kaedah Mahkamah Tinggi 1980 boleh digunakan oleh Mahkamah Rayuan kerana k. 4 Kaedah-Kaedah Mahkamah Rayuan. Ianya bersifat kebidangkuasaan. A

Perintah Mahkamah Tinggi bagi responden pertama dan kedua disahkan; award bagi responden ketiga diketepikan; award bagi responden keempat dekenakan faedah sebanyak 8% bermula dari tarikh kemalangan.] B

Case(s) referred to:

Artic Builders & Co (Pte) Ltd v. Tan Tong Meng Co (Pte) Ltd [1984] 2 MLJ 5 ***(refd)***

Banque Financiere De La Cite SA v. Westgate Insurance Co Ltd [1991] 2 AC 249 ***(refd)*** C

CE Heath Underwriting & Insurance (Australia) Pty Ltd v. Edwards Dunlop & Co Ltd [1992] 112 ALR 161 ***(refd)***

Executive Engineer v. DN Senapati AIR 1980 Orissa 74 ***(refd)***

GIO (NSW) v. Kimmedy [1988] 5 ANZ Insurance Cases 60-880 ***(refd)*** D

Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 CA ***(refd)***

Katotikidis v. Mr Submarine Ltd [2002] ACWSJ 10135 ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 FC ***(refd)***

Lian Hup Manufacturing Co Sdn Bhd v. Unitata Bhd [1994] 3 CLJ 338 HC ***(refd)*** E

Mann Macneal & Steeves Ltd v. Capital & Counties Insurance Co Ltd [1921] 2 KB 300 ***(refd)***

Manufacturers' Mutual Insurance Ltd v. John H Boardman Insurance Brokers Pty Ltd 120 ALR ***(refd)*** F

March Cabaret Club & Casino Ltd v. London Assurance Ltd [1975] 1 Lloyds Rep 169 ***(refd)***

Maschke Estate v. Gleeson [1986] 54 OR (2d) 753 ***(refd)***

Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

Murtadza Mohamed Hassan v. Chong Swee Pian [1980] 1 MLJ 216 ***(refd)*** G

Newsholme Bros v. Road Transport and General Insurance Co Ltd [1929] 2 KB 356 ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 MLJ 143

Re Anchor Assurance Co [1870] LR 5 Ch App 632 ***(refd)***

Re Kerr [1943] SASR ***(refd)*** H

Rozanes v. Bowen [1928] 32 LlL Rep 98 ***(refd)***

Schoolman v. Hall [1951] Lloyd's Rep 139 ***(refd)***

Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210 ***(refd)***

Stokell v. Heywood [1897] 1 Ch 459 ***(refd)***

Syarikat Uniweld Trading v. The Asia Insurance Co Ltd [1996] 3 CLJ 142 HC ***(refd)*** I

A *Thompson v. London, Midland and Scottish Rail Co [1930] 1 KB 41* ***(refd)***
Whiten v. Pilot Insurance Company [2002] 209 DLR (4th) 257 ***(refd)***
Willis v. Willis & Hodgson [1941 MLJ 169 ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 24(2)
B Courts of Judicature Act 1964, s. 69(4)
Insurance Act 1963, s. 44A
Rules of the Court of Appeal 1994, r. 4
Rules of the Federal Court 1995, r. 137
Rules of the High Court 1980, O. 92 r. 4

C **Other source(s) referred to:**
Crawford, *The Construction of Statutes,* 1978 reprint, p 494
Halsbury's Laws of England, 4th edn, vol 25, para 494
Ivamy, *General Principles of Insurance Law*, 1986, 5th edn, pp 249-50

D *For the appellant - Belden Premaraj (PL Leong with him); M/s Sivananthan*
For the respondents - Khoo Eng Chin; M/s Khoo & Sidhu

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R1-25-114-1999]

E *Reported by Amutha Suppayah*

JUDGMENT

Gopal Sri Ram JCA:

The appellant is seeking a reversal of the High Court's judgment
F refusing to set aside an arbitrator's award. The award relates to claims made by the appellant against four different insurance companies on personal accident policies he had taken out with each of them. Of the four claims, three were dismissed by the arbitrator. He allowed the fourth but awarded interest at 8% per
G annum from the dated of the award, *viz*., 17 September 1999 and not from the date of the accident which was on 26 June 1992. Since each claim has its own peculiarities I had better deal with them separately.

H But before I do that, there are two matters that I need to attend to. First, I need to set out the issues that the parties to the arbitration formulated for the arbitrator to decide. These read as follows:

I

Leong Kum Whay v. QBE Insurance (M) Sdn Bhd

1. Whether the 1st Respondent had waived the requirement of disclosure by issuing the Renewal Certificate dated 11th March, 1992 (CBD-8) without requiring the Claimant to fill and submit a fresh proposal.

2. Whether the said Renewal Certificate has been obtained by the Claimant by misrepresentation and/or non-disclosure of material facts.

Leong Kum Whay v. Malaysia & Nippon Insurans Berhad

1. Whether the 2nd Respondent had waived the requirement of disclosure by issuing Policy No. 12D/A220/92-002845 dated 13th May, 1992 (RBD 12) without requiring the Claimant to fill and submit a fresh proposal.

2. Whether the said Policy has been obtained by the Claimant by misrepresentation and/or non-disclosure of material facts.

Leong Kum Whay v. The Great Eastern Life Assurance Co. Ltd.

Whether Policy No. PA718839-A dated 13th March, 1992 (RBD 21-25) has been obtained by the Claimant by misrepresentation and/or non-disclosure of material facts.

Leong Kum Whay v. MUI Continental Insurance Sdn. Bhd.

Whether Policy No. VP 0698 M dated 8th January, 1991 (RBD 36-40) has been obtained by the Claimant by misrepresentation and/or non-disclosure of material facts.

Dated this 6th day of July, 1999.

Next, I must remind myself of the kind of jurisdiction that is being invoked here. I do so because there is a great temptation to overlook the fact that an application to set aside an arbitrator's award is not an appeal. The grounds on which an award may be set aside are limited to there being an error of law on the face of the record or some misconduct on the part of the arbitrator. "Misconduct" in this context has no pejorative connotation. It is a word that appears in s. 24(2) of the Arbitration Act 1952. It is one of the grounds on which an award may be set aside. It has been defined as follows by Raja Azlan Shah J in *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210:

> In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated. In my judgment the plaintiffs' complaint is sustainable only if the failure to do so had occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award.

With that I turn to deal with the award in relation to the first claim. This is against QBE Insurance ("QBE"). The original policy was issued on 7 March 1991. It was effective until 6 March 1992. During the currency of this personal accident policy, the appellant had obtained two life insurance policies from two other insurance companies. The original policy was renewed on 6 March 1992 for a further period of one year. The renewal was by means of a renewal certificate which, *inter alia*, said that the policy had been renewed for the stipulated period "subject to all terms, conditions and endorsements" in the original policy.

The accident in respect of which the appellant made his claim occurred on 26 June 1992. QBE repudiated liability and refused to pay. It said that there had been non-disclosure of a material fact by the plaintiff. Because he had not disclosed the life insurance policies when he had the policy renewed. To justify its repudiation it relied on both the proposal form in respect of the original policy as well as cl. 6.3 of the policy.

The proposal form contained the following three important matters. First, a declaration by the plaintiff that all answers and statements made in the proposal were true in every respect. Second, a statement that the proposal and declaration were the basis of the policy and were considered as being incorporated in it. This is what lawyers call a "basis clause". Its effect is that:

> when answers, including that in question, are declared to be the basis of the contract, this can only mean that their truth is made a condition, exact fulfilment of which is rendered by stipulation foundational to its enforceability" (per Viscount Haldane in *Dawsons Ltd v. Bonnin* [1922] 2 AC 413.)

And,

> once parties to a policy agree that something should be the basis of their contract, it is not open to the court to consider the question of materiality." Per Suffian FJ in *China Insurance Co Ltd v. Ngau Ah Kau* [1972] 1 MLJ 52.

The third matter of importance is the following question in the proposal:

> Are you at present insured against Life, Accident or Sickness? If yes, give details of name of Company, amount of insurance (capital sum and weekly Benefit)

The appellant gave a negative response to this question.

Now, the appellant's answer that he had no life insurance was accurate at the time when he gave it. But it was no longer true when the policy was renewed with the mutual consent of both parties. Was he obliged to tell QBE about the life policies before the renewal? The learned arbitrator said that he was. This is because the renewal of the policy had been by mutual consent and hence operated as a fresh contract of insurance. As such the appellant was under a duty to inform QBE about the life policies. Counsel for the appellant submits that the award in this instance contains an error of law. With respect I do not agree. I think that the award of the learned arbitrator accurately states the law on the point under discussion.

To appreciate the point under discussion it is important to distinguish between a renewal of a policy and its mere extension. This vital distinction was adverted to by Deane J in *CE Heath Underwriting & Insurance (Australia) Pty Ltd v. Edwards Dunlop & Co Ltd* [1992] 112 ALR 161 as follows:

> The distinction between the renewal of a policy and the extension of a policy was expressed in the following terms by Mayo J in Re Kerr [1943] SASR 8, at 16:
>
> > Strictly, a "renewal" is descriptive of a repetition of the whole arrangement by substituting the like agreement in place of that previously subsisting, to be operative over a new period, whereas an "extension" betokens a prolongation of the subsisting contract by the exercise of a power reserved thereby to vary one of its provisions, that is, by enlarging the period. Upon a renewal similar rights revest .... A contract reserving continuous rights of renewal will,

A

> if these be exercised, lead to succeeding contracts in a series, the identity of each contract (being) separate and distinct. On the other hand, the exercise of the right of extension augments the length of time over which the contract operates, without changing its identity.

B

Whether there is a renewal or an extension of an insurance policy is a question of construction, (*GIO (NSW) v. Kimmedy* [1988] 5 ANZ Insurance Cases 60-880, at 75,541) the term 'renewal' often being used to refer to both 'renewal' and 'extension' in the sense that those words are used above. It is, however, well established

C

that, where a policy is renewable only by mutual consent (ie not as of right), the renewal results in a fresh contract rather than the extension of an existing contract. (See *Re Kerr* [1943] SASR, at 15; *Halsbury's Laws of England*, 4th ed, vol 25, para 494).

D

Of course, a policy may expressly stipulate that it is not to continue in force beyond the period of insurance, unless renewed by mutual consent. See, eg, *Stokell v. Heywood* [1897] 1 Ch 459. And where a policy, such as the ordinary form of life policy, expressly provides for continuation beyond the specified period of

E

insurance unless a particular event, such as the non-payment of the premium, takes place, the renewal is an extension of the original contract. See *Re Anchor Assurance Co* [1870] LR 5 Ch App 632, at 638. But where a policy is silent on the question of renewal, renewal of it will generally constitute a new contract. See

F

Ivamy, *General Principles of Insurance Law*, (5th ed, 1986), pp. 249-50."

In my judgment, the position is this. When, as here a policy of insurance for a fixed period is renewed by mutual consent, the

G

original proposal form becomes incorporated into the renewed policy and continues to form the basis of the contract. And more so in the present case where the renewal certificate expressly states that the renewal is "subject to all terms, conditions and endorsements in your original policy". One of the terms in the

H

original policy was cl. 6.3 which reads as follows:

> Before renewing this policy the Insured shall give written notice to QBE of any material fact affecting this Insurance which has come to the Insured's notice during the preceding Period of Insurance including notice of any disease physical or mental defect

I

or Infirmity affecting the Insured Person.

Clause 6.3 says "material fact". Now, were the life policies a "material fact" in this case? I think they were. When the renewal certificate said "subject to all terms, conditions and endorsements in your original policy", it includes the declarations in the original proposal form which formed the basis of the contract. They too became part of the renewed policy. And so you have the appellant saying to QBE in the renewed policy that he did not have any life insurance. That is a material fact because of the basis clause. But it was untrue. Hence QBE was clearly within its contractual rights to refuse payment.

Before concluding on this part of the case, it is necessary, for completeness to recall the two agreed issues that the arbitrator had to deal with. He resolved both in QBE's favour. Thus far I have only dealt with the second issue. I have done so because in my judgment the two issues are really tied up together. Ultimately the question is whether QBE was entitled to repudiate the contract. Once you accept that the life policies are a material fact and resolve the second issue in QBE's favour that is an end of the matter. No question of a fresh proposal form can arise when the renewal certificate says that the renewal is on the same terms and conditions as contained in the original policy. In any event, there is neither any error of law nor any misconduct by the learned arbitrator in respect of the first issue.

For these reasons, the learned judge was entirely correct in upholding so much of the award that dismissed the appellant's claim against QBE.

That brings me to the claim against Malaysia & Nippon Insurans Berhad ("Nippon"). The facts here are different from those of the QBE claim in important respects. It is not disputed that the original Nippon policy was issued for the period 25 February 1991 to 24 February 1992. On 17 February 1992 a fresh policy was issued for the period 25 February 1992 to 24 February 1993. There was no renewal certificate as there was in the QBE case. There was no incorporation clause as was housed in the QBE renewal certificate. There was no QBE policy cl. 6.3 in the Nippon policy. There was no fresh proposal form. There was nothing in the second policy to say that it was issued pursuant to the earlier proposal form. Does all this make a difference? Counsel for the appellant says that it makes a world of difference. With respect, I do not agree. And I will explain why.

It is settled beyond dispute that a contract of insurance is one that imposes a mutual duty on the parties to it to act uberrimae fides towards each other. On the part of the insured, he or she must make full disclosure of all material facts. It is not for him or her to decide in his or her own mind what is material. It does not matter whether the insurer asks any questions of the insured. The duty is on the insured to make full disclosure of material facts within his knowledge. Whether a particular fact is material is a question of fact. (See, *Mann Macneal & Steeves Ltd v. Capital & Counties Insurance Co Ltd* [1921] 2 KB 300). But the duty to make full disclosure of all material facts is not an implied term of a contract of insurance. There is in fact no contract at the point at which the duty arises; the parties being still at the stage of negotiations. It is therefore a pre-contractual duty imposed by the common law. I take these propositions to be settled by authority.

I begin with *Rozanes v. Bowen* [1928], 32 Ll.L Rep 98, at p. 102, where Scrutton LJ said this:

> As the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters **without being asked** of all the material circumstances, because the underwriter knows nothing and the assured knows everything. That is expressed by saying that it is a contract of the utmost good faith - *uberrima fides*. [Emphasis added.]

Rozanes v. Bowen was referred to by May J in *March Cabaret Club & Casino Ltd v. London Assurance Ltd* [1975] 1 Lloyds Rep 169 at p 175, where he said:

> Bearing in mind the basis of the rule however, which is, as Lord Justice Scrutton pointed out, the fact that there is a disparity in negotiating position between the intending assured and insurers, in my judgment the duty to disclose is not based upon an implied term in the contract of insurance at all; it arises outside the contract; it applies to all contracts *uberrimae fidei* and is not limited to insurance contracts; it also applies, for instance, to contracts of partnership, contracts of surety, certain family settlement contracts and other similar types of contractual relationship.

Speaking of the duty imposed upon an insured, Cohen LJ in *Schoolman v. Hall* [1951] Lloyd's Rep 139 at p 143 said:

> So, I think, applying those observations here, while the insurers have stipulated that the answers to the fifteen questions 'shall be the basis of the contract', that only has the effect of preventing any argument as to the materiality of those questions should dispute arise, but **it does not relieve the proposer of his general obligation at common law to disclose any material** which might affect the risk which was being run, or **which might affect the mind of the insurer as to whether or not he issue a policy**. (emphasis added.)

The nature of the duty to make disclosure was also considered by Lord Jauncey of Tullichettle in *Banque Financiere De La Cite SA v. Westgate Insurance Co Ltd* [1991] 2 AC 249 where he said

> The duty of disclosure arises because the facts relevant to the estimation of the risk are most likely to be within the knowledge of the insured and the insurer therefore has to rely upon him to disclose matters material to that risk. The duty extends to the insurer as well as to the insured: *Carter v. Boehm* [1766] 3 Burr 1905 ([1766] 97 ER 1162). The duty is, however, limited to facts which are material to the risk insured, that is to say, **facts which would influence a prudent insurer in deciding whether to accept the risk** and, if so, upon what terms and a prudent insured in entering into the contract on the terms proposed by the insurer. Thus any facts which would increase the risk should be disclosed by the insured and any facts known to the insurer but not to the insured, which would reduce the risk, should be disclosed by the insurer. There is, in general, no obligation to disclose supervening facts which come to the knowledge of either party after conclusion of the contract (*Lishman v. Northern Maritime Insurance Co.* [1875] LR 10 CP 179), subject always to such exceptional cases as a ship entering a war zone or an insured failing to disclose all facts relevant to a claim.

So much for the insured's duty. For completeness I would add that there is a corresponding duty on the part of an insurer to act with utmost good faith towards its insured. In *Maschke Estate v. Gleeson* [1986] 54 OR (2d) 753, at 756, Montgomery J put the duty in this way:

> A contract of insurance is one of uberrimae fides, the utmost of good faith. This is not a situation where an insurer is indemnifying its assured and paying a third party. This is a case where the insurer is being asked to pay its own insured. The duty to act promptly and in good faith arises the day the insurer receives the claim. To find otherwise is to fail to understand the realities of the market place.

More recently, in *Katotikidis v. Mr Submarine Ltd* [2002] ACWSJ 10135, Taliano J referred to the judgment of the Supreme Court of Canada in *Whiten v. Pilot Insurance Company* [2002] 209 DLR (4th) 257 as follows:

> I note that in upholding the award of punitive damages in *Whiten*, the court observed that a contract between an insurer and its insured was one of utmost good faith because, although the insurer is not a fiduciary, it holds a position of power over an insured since the insured is in a vulnerable position and is entirely dependent on the insurer when a loss occurs. For that reason, in every contract of insurance, an insurer has an implied obligation to deal with the claims of its insured's in good faith. It was held that a breach of the implied duty of good faith meets the requirement of an independent actionable wrong.

I return to the present instance. There is no doubt that Nippon's original policy and its second policy are two different contracts. In *Manufacturers' Mutual Insurance Ltd v. John H Boardman Insurance Brokers Pty Ltd* 120 ALR, Mason CJ, Toohey and McHugh JJ said:

> Under the general law, the renewal of a contract of insurance that is only renewable by mutual consent, and not by right, results in a fresh contract **separate from the pre-existing contract of insurance**. *CE Heath Underwriting & Insurance (Australia) Pty Ltd v. Edwards Dunlop & Co Ltd* [1993] 176 CLR 535 at 545-6;112 ALR 161. See also Ivamy, *General Principles of Insurance Law*, [1986], pp 247-50.

Was the appellant duty bound to disclose the other personal accident policies to Nippon before it issued the second policy? Based on the authorities I have earlier discussed, that question must be answered in the affirmative. Nippon considered the existence of other personal accident policies to be of significant importance to it. That is why it had put the question about it in its original proposal form. The appellant had answered that question in the negative. His answer was true at the time he gave it. But it was no longer true when the second policy was issued. The appellant must, as a reasonable man be taken to have known the importance that Nippon attached to the existence of other personal accident policies. Accordingly, the materiality of the fact not disclosed by the appellant was inferentially established before the learned arbitrator. And the arbitrator was therefore entirely correct as a matter law in rejecting the appellant's claim against Nippon.

With that I now turn to the appellant's claim against The Great Eastern Life Assurance Co. Ltd ("Great Eastern"). The facts here are as follows. On 15 March 1992, Great Eastern issued a personal accident policy to the appellant valid for one year. It was based on a proposal form dated 13 March 1992. It contained the following question:

> What Accident, Sickness or Life Insurance do you now carry or applied for?

The answer that appears in the form discloses two life policies and one personal accident policy. In fact, the appellant had two life and seven personal accident policies. The learned arbitrator found as a fact that the appellant had disclosed all these nine policies to one Lee Kow Eee, an agent of Great Eastern who witnessed the proposal form. The learned arbitrator found for Great Eastern on the ground that the disclosure to Lee was not disclosure to Great Eastern. He held that Lee was only a life insurance salesman for Great Eastern and on Lee's own admission had no authority to deal with personal accident policies. The learned arbitrator mentioned s. 44A of the Insurance Act 1963 but held that it did not assist the appellant and that the case was governed by the pre-existing common law. It is therefore necessary first to examine the position at common law and then see what exactly it is that the section does.

The position at common law is this. Where an insurer's agent either fills in or assists in the filling in of a proposal form, he acts in that instance as the agent of the insured and not the insurer. It did not matter that the proposer was illiterate. The common law regarded illiteracy as a misfortune and not a privilege. See, *Thompson v. London, Midland and Scottish Rail Co* [1930] 1 KB 41. It followed that any untruth in the proposal bound the proposer even if it was the agent and not he who was its author. As Lord President Azmi said in *China Insurance Co Ltd v. Ngau Ah Kau*:

> Before us it was argued for the appellant that when Mr. Hoe was helping the plaintiff to fill up the proposal form he was merely acting as the agent of the plaintiff and not the company. In *Biggar v. Rock Life Assurance Co* [1902] 1 KB 516 the proposal form was filled by the agent, many of the answers filled in by him being false in material aspects, but the false answers were inserted without the knowledge or authority of the applicant, who signed the proposal form without reading it. The proposal contained a

declaration that the applicant agreed that the statements in the proposal should form the basis of the truthfulness of the statements in the proposal. It was held that in filling up the answers in the proposal form the agent was acting as the agent of the applicant.

His lordship then quoted the following passage from the judgment of Scrutton J in *Newsholme Bros v. Road Transport and General Insurance Co Ltd* [1929] 2 KB 356:

> In my view, the important question for the decision of this case is whether the knowledge of the agent, acquired in filling up the proposal for the assured, is to be taken as the knowledge of the company. If the person having authority to bind the company by making a contract in fact knows of the untruth of the statements and yet takes the premium, the question may be different. Even then I see great difficulty in avoiding the effect of the writing signed by the proposer that the truth of the statements is the basis of the contract. But where the person contracting for the company has no knowledge but only constructive notice, the difficulties of the proposer are greater. In commercial matters, the doctrine of constructive notice is not favoured; see the explanation by Lindley LJ in *Manchester Trust v. Furness* [1895] 2 QB 539, 545.

Now, as you can see, the common law was harsh. It produced unjust consequences. Many innocent insured persons found themselves unprotected by insurance after paying premiums over a considerable period of time. Their legitimate expectation to be indemnified against losses was defeated by the agency rule. It is to remedy this position that Parliament intervened. It enacted s. 44A which came into force on 3 March 1978 by virtue of A432. The section reads:

> (1) A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.

(2) Any statement made or any act done by any such person in his representative capacity shall be deemed, for the purpose of the formation of the contract, to be a statement made or act done by the insurer notwithstanding any contravention of s. 16A or any other provision of this Act by such person.

(3) This section shall not apply?

(a) where there is collusion or connivance between such person and the proposer in the formation of the contract; or

(b) where such person has ceased being its agent and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general the fact of such cessation.

Some comment is necessary about the section. It requires, first, that there be an agent who is authorised by an insurer. Second, such an agent must solicit or negotiate a contract of insurance in his capacity as agent. Once these two conditions are satisfied certain consequences follow. First, the agent is deemed to be the agent of the insurer for the purpose of the formation of the contract. Second, the knowledge of the agent about any fact that is relevant to the insurer accepting the risk is treated as the knowledge of the insurer. What s. 44A(1) does is this. Where an insurer holds out that a person is its agent, then the knowledge of the agent is deemed to be the knowledge of the insurer. The only two circumstances in which sub-s. (1) does not bite are spelled out in sub-s. (3). These are collusion or connivance between the agent and the insured; and cessation of agency of which the insurer has taken reasonable steps to inform the public at large.

There can be no doubt that s. 44A targeted the reversal of the common law. That is the way in which the section was construed in the carefully written judgment of Abdul Malik Ishak J in *Syarikat Uniweld Trading v. The Asia Insurance Co Ltd* [1996] 3 CLJ 142 with which I agree. The section is remedial. Hence it must be "given a benevolent interpretation" (per Aitken J in *Willis v. Willis & Hodgson* [1941 MLJ 169. Crawford in his authoritative work *"The Construction of Statutes"* (1978 reprint) at p. 494 says this about remedial statutes:

> To understand the reason for giving remedial statutes a liberal construction, it is necessary that we know what statutes fall within this category. While they have been defined in a preceding section, for the sake of convenience, some slight repetition will be valuable. For our discussion here, however, it will be sufficient to define a remedial statute as one which remedies a defect in the common law or in the pre-existing body of statute law. Such statutes play an important part in the jurisprudence of an advancing society. They supply the defects and abridge the superfluities in pre-existing law, which arise from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of judges, and from any other cause. They serve to keep our system of jurisprudence up-to-date and in harmony with new ideas or conceptions of what constitute justice and proper human conduct. Their legitimate purpose is to advance human rights and relationships. Unless they do this, they are not entitled to be known as remedial legislation nor to be liberally construed. Manifestly, a construction which promotes improvement in the administration of justice and the eradication of defects in our system of jurisprudence, should be favoured over one which perpetuates wrong. It seems proper to assume that the lawmakers intended to advance our laws forward as far as our conceptions of justice and proper conduct extend. For this reason, if no other, remedial legislation is entitled to a liberal construction.

Unfortunately, the learned arbitrator placed a very narrow and restrictive interpretation on s. 44A. He construed the words "a person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity" as enabling an insurer to place limits on the agent's authority. But the section does not admit that. It speaks of the authority in general terms. It does not say that the agent must be authorised to deal with a specific type of insurance. By reading it restrictively the learned arbitrator was introducing a further exception to those already provided by sub-s. (3). This, in my judgment, amounts to unauthorised legislation.

For these reasons, the award in respect of the appellant's claim against Great Eastern is fatally flawed by an error of law and must be set aside.

That leaves the award in respect of the appellant's claim against MUI Continental Insurance Sdn. Bhd. Here the learned arbitrator found for the appellant. But he awarded interest on the sum claimed only from the date of the award and not from the date of the accident. And he gave no reasons for not making the award. Learned counsel for the insurer submits that the awarding of interest is a matter of discretion and that there is no misconduct or error of law disclosed. With respect, I am unable to agree.

In the first place it is well settled that an arbitrator, in the absence of a specific clause in the agreement, has power to award interest. See, *Lian Hup Manufacturing Co Sdn Bhd v. Unitata Bhd* [1994] 3 CLJ 338; *Executive Engineer v. DN Senapati* AIR [1980] Orissa 74. In the second place, the general rule in a claim for a debt (and this was a debt owed by the insurer to the appellant) is that interest must run from the date on which the debt became due and payable. See, *Murtadza bin Mohamed Hassan v. Chong Swee Pian* [1980] 1 MLJ 216. In this case it should have been from the date of the accident. Because that is when the debt accrued. Here the learned arbitrator was departing from established practice having the force of law. He would have been entitled to do so if he thought that there were reasons for depriving the appellant of interest for the relevant period. Here he delivered a speaking award. What is a speaking award? It is an award "which deals with all issues of fact and law and the findings of fact being final and conclusive" (per Lai Kew Chai J in *Artic Builders & Co (Pte) Ltd v. Tan Tong Meng Co (Pte) Ltd* [1984] 2 MLJ 5 (CA)). So here the learned arbitrator was obliged to give his reasons for refusing to award interest in the usual way. His award is therefore liable to be set aside for misconduct in the sense that there has been some "irregularity of action which is not consonant with the general principles of equity and good conscience" (see, per Raja Azlan Shah J in *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority*). At the risk of repetition, there was in this case irregularity of action inconsonant with the general principles of equity and good conscience because the learned arbitrator, without reasons departed from the established principle of awarding interest on a debt. But that is not the end of the matter as there is a difficulty in this case.

In the ordinary way, this court would remit the award to the arbitrator with the appropriate direction to him. But here the learned arbitrator has passed away and no remitting order can therefore be made. The other course that is open to us is to set aside the whole award of interest. But if we do that, the appellant will lose even the post-award interest made by the learned arbitrator. That would be an injustice. Does that mean that we cannot do anything about it? I think we can. We are not helpless.

It is to meet such situations as the present that s. 69(4) of the Courts of Judicature Act 1964 was designed to meet. That section empowers us to "make any order which ought to have been given or made, and make such further or other orders as the case requires". The section enables this court to do complete justice between the parties. See *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil s/o Pereira & Ors* [1996] 4 CLJ 747; *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* [1997] 2 CLJ 11 (FC). Further, there is O. 92 r. 4 of the Rules of the High Court 1980 which provides:

> For the removal of doubts, it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the High Court to make any order as may be necessary to prevent an abuse of the process of the court.

This rule of court is available to us because of r. 4 of the Rules of the Court of Appeal 1994. It is jurisdictional in nature. See, *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 MLJ 143.

Rule 137 of the Rules of the Federal Court 1995 is *ipsissima verba* O. 92 r 4. It says:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent Powers of the Court to hear any to prevent an abuse of the process of the Court.

And in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645, Steve Shim CJ (Sabah & Sarawak) said when discussing r. 137:

Where there is a clear case of injustice being committed, the Federal Court, as the apex court in the land, cannot stand idly by and do nothing. It cannot and should not shirk from its responsibility of preventing injustice in appropriate cases. It must deal with it. In this regard, the Federal Court has been conferred with inherent powers under r. 137 of the Rules of the Federal Court 1995 ('the RFC'). This has been reiterated very recently by the Federal Court in *Chia Yan Teck & Anor v. Ng Swee Keat & Anor* (Civil Appeal No 02-03-98(B), when Mohamed Dzaiddin Chief Justice said, *inter alia*:

> Rule 137 of the Rules clearly gives us the inherent power to hear any application or make any order as may be necessary to prevent injustice.

In addition, I take the view that the Federal Court also has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustices in limited circumstances.

In my judgment, this court has ample jurisdiction and powers to deal with difficulty that has arisen in the present instance. There is nothing in the Arbitration Act 1952 that prohibits us from making an award of interest in a case as the present. Indeed, that Act is silent about what is to happen where an arbitrator dies. Neither is there anything in the arbitration clause in the relevant policy that says what is to happen in a situation such as the present. There is therefore nothing in our way in doing justice in this case. To meet the ends of justice I would accordingly order that the learned arbitrator's award in respect of the fourth respondent do bear interest at the rate of 8% from the date of the accident.

For the reasons already given, I would confirm the orders of the High Court in respect of the first and second respondents and set aside the award in respect of the third respondent. In respect of fourth respondent, I would make the order adverted to in the previous paragraph of this judgment.

A As for costs, it is clear that the appellant has only partially succeeded in his appeal. He has lost on two counts and succeeded on the other two. I think that in the circumstances of this case he should receive only half his costs here and in the court below.

B

My learned brothers Mohd Ghazali bin Mohd Yusoff and Azmel bin Haji Maamor, JJCA have seen this judgment in draft and have expressed their agreement with it.

C

D

E

F

G

H

I